Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1746

JOHN B. KILROY, SR.,
Petitioner,

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; PAUL DEFALCO, JR., in his official capacity as Regional Administrator, Region IX, United States Environmental Protection Agency; THE STATE WATER RESOURCES CONTROL BOARD; JOHN E. BRYSON, in his official capacity as Chairman of the State Water Resources Control Board; REGION IV OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD; and RAYMOND M. HERTEL, in his official capacity as Executive Officer of Region IV of the California Regional Water Quality Control Board,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John B. Kilroy, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 14 E.R.C. 1153 (1980). The Memorandum and Order of the United States District Court for the Central District of California (Appendix B, *infra*) is reported as *Pacific Legal Foundation v. Quarles* at 440 F. Supp. 316 (C.D. Cal. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the court below that the specific project known as the Hyperion Treatment Plant Interim Sludge Disposal Project is a condition of the City of Los Angeles' National Pollutant Discharge Elimination System permit conflicts with the decision of this court in *Costle v. Pacific Legal Foundation,* 14 E.R.C. 1153 (1980).

2. Whether the Environmental Protection Agency can evade the requirement in the Federal Clean Water Act, 33 U.S.C. § 1371(c)(1), that an environmental impact statement be prepared on a project receiving federal financial assistance under the Act by inserting the project as a condition in a National Pollutant Discharge Elimination System permit.

STATUTES INVOLVED

Title 33, United States Code, § 1371(c)(1):

> **"§ 1371. Authority under other laws and regulations**
>
> . . . .
>
> "(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by Section 1281 of this title, and the issuance of a permit under Section 1342 of this title for the discharge of any pollutant by a new source as defined in Section 1316 of this title, no action of the administrator taken pursuant to this chapter shall be deemed a major Federal action significantly effecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."

Title 42, United States Code, § 4332(2)(C)

> **"§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter; and (2) all agencies of the Federal Government shall—

> . . . .
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

STATEMENT OF THE CASE

This action is the first of two actions brought by John B. Kilroy, Sr., against the United States Environmental Protection Agency (EPA) in an attempt to obtain an opportunity to represent his interests in EPA proceedings which cause the implementation of a specific project in Los Angeles, California, known as the Hyperion Treatment Plant Interim Sludge Disposal Project. The second action, *Costle v. Pacific Legal Foundation,* 14 E.R.C. 1153 (1980), was decided by this Court on March 18, 1980, contrary to the interests of Kilroy. This petition is brought because the decision below read in light of this Court's decision in

Costle v. Pacific Legal Foundation places an insuperable burden upon individual citizens desiring to exercise their right of public participation in decisions made pursuant to the Federal Clean Water Act (also known as the Federal Water Pollution Control Act), 33 U.S.C. §§ 1251, *et seq.*

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, requires the preparation of a detailed environmental impact statement (EIS) for any projects significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). This sweeping provision of NEPA is limited by 33 U.S.C. § 1371(c)(1) which exempts the actions of the administrator of EPA taken pursuant to the Clean Water Act from the environmental impact statement requirement with two express exceptions. The exception which is pertinent to this action continues the EIS requirement "for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by Section 1281 of this title."

The National Pollutant Discharge Elimination System (NPDES) permit issued to the City of Los Angeles on August 18, 1975, directed the city to terminate its 20-year practice of discharging sewage sludge through a seven-mile outfall into deep ocean waters.[1] Over one year later on November 18, 1976, EPA first publicly announced in a negative declaration that the Hyperion Treatment Plant Interim Sludge Disposal Project had been selected as the

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[1]The NPDES permit did not describe the alternative process to be used to achieve the "sludge-out" provision. It did, however, establish a timetable for implementation of task "B-1," the termination of the sludge discharge, based upon the future approval by EPA of a specific alternative disposal process. That timetable reads as follows:

alternative sludge disposal process. Appendix C, *infra*, at C-4. This project, which was proposed to receive federal financial assistance as authorized by 33 U.S.C. § 1281, involved the dewatering of the sewage sludge by centrifuges and the trucking of the resultant concentrated sludge through the streets of Los Angeles to sanitary landfills. John B. Kilroy, Sr., whose place of business is located on the primary truck route, was concerned about the substantial adverse impacts of the huge trucking program on the Los Angeles community. He and several members of the Los Angeles City Council initiated this action on February 14, 1977, when EPA refused requests that an EIS be prepared on the project. On April 18, 1977, the Regional Administrator for EPA executed an affidavit which was filed with the court in which EPA agreed to prepare an EIS on

Task B-1	Completion Date	Report of Compliance
Completion of approvable plans and specifications for Phases I, II and III	not later than 6 months from date of concept approval	***
Award contract and begin construction	not later than 9 months from date of concept approval	***
Receive delivery of Phase I dewatering equipment	not later than 15 months from the date of conceptual approval, but in no case later than December 31, 1976	***
Complete construction of Phase I and achieve operational level	not later than 18 months from date of concept approval	***
Complete construction of Phase II and achieve operational level	not later than 24 months from date of concept approval	***
Complete construction of Phase III and achieve operational level	not later than 30 months from date of concept approval	***

***report to be submitted within 15 days of date specified for completion of compliance schedule task.

the project and to withhold funds until the EIS was completed. Appendix C, *infra*. The litigation continued, however, because EPA claimed that the project should be considered a condition of the NPDES permit and it intended to enforce that condition to require the project to be implemented without regard to the EIS.

On July 20, 1977, the District Court handed Kilroy the classic Pyrrhic victory. The court acknowledged that an EIS was to be done on the project and that an injunction seemed to be "the sensible course." Appendix B, *infra,* at B-6. However, no injunction issued because the court agreed with EPA that the project should be considered a condition of the NPDES permit and therefore was shielded by 33 U.S.C. § 1371(c)(1). *Id.* at B-6-7. The result of this decision is that Kilroy is to be heard on the adverse effects of the project after the project is implemented—a result to which the District Court applied the understated appellation, "anomalous." *Id.* at B-6.

The District Court, however, apparently believed that there was an alternative process by which Kilroy could have effectively exercised his right to be heard. The court stated:

> "To correct abuses of discretion and misapplication of Water Act provisions, review procedures exist under the Water Act, 33 U.S.C. §§ 1365, 1369, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Direct review of the EPA's alleged mistakes in administering the Water Act is much more appropriate than indirect review under the guise of an EIS. *Id.* at B-21.

This suggestion that Kilroy's concerns with the Hyperion Treatment Plant Interim Sludge Disposal Project should

be addressed directly under the provisions of the Water Act follows naturally from that court's finding that the project was a condition of the NPDES permit. This Court, however, has now ruled in relation to the same Hyperion Treatment Plant Interim Sludge Disposal Project that Kilroy was not entitled to a hearing under the Clean Water Act after the selected alternative sludge disposal process was first announced.

The decision of the District Court was affirmed by the Court of Appeals in a brief opinion which expressly concurred that the interim sludge disposal project was a condition of the NPDES permit and on that basis could be implemented without the prior preparation of an environmental impact statement. Appendix A, *infra* at A-3.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Is in Conflict With the Decision of This Court in Costle v. Pacific Legal Foundation

Apparent conflict between the decision in this case and the conclusion set forth in *Costle v. Pacific Legal Foundation* was initially brought to the Court's attention in the Petition for Rehearing filed in *Costle v. Pacific Legal Foundation.*[2] The question of conflict between the decisions turns on whether this Court has ruled that the Hyperion Treatment Plant Interim Sludge Disposal Project was not a condition of the NPDES permit. The decision in *Costle v. Pacific Legal Foundation* indicates that the permit requires "that the city develop an alternative method of sludge disposal" (Opinion at 18) but does not require the

[2]As of the date of printing of this petition, no action has been reported on the Petition for Rehearing.

precise Hyperion Treatment Plant Interim Sludge Disposal Project. However, the focus of the admitted controversy in this case is this particular alternative project and the Opinion also stated that "the most controversial aspects of the Hyperion permit . . . were all included within the 1975 permit." *Id.* If this Court concluded that the specific alternative sludge disposal project is not a condition of the NPDES permit, then there is a direct conflict with the contrary conclusion which formed the basis of the decisions of the courts below in this case. If this Court based its decision on the alternative conclusion that the specific alternative sludge disposal project, although not announced until over one year after the permit was issued, related back to the original permit and was incorporated into the previously established general permit requirement that the sludge discharge be terminated, then, for the reasons set forth below, the Court of Appeals in this case has applied 33 U.S.C. § 1371(c)(1) in a manner inconsistent with the Congressional purpose in enacting that provision.

B. The Inclusion in an NPDES Permit of a Discharge Prohibition Does Not Evade the Requirement in 33 U.S.C. § 1371(c)(1) That an EIS Be Prepared on the Specific Project Which Is Eventually Adopted to Provide the Alternative Disposal Method

This issue is presented to the Court only in the context of a case in which a general requirement is established in a permit and a specific project which will implement that requirement is not announced until sometime later after any opportunity has passed to participate in the permit process or to obtain judicial review of the permit require-

ment. It is only under these facts that the combined effects of the decision of this Court in *Costle v. Pacific Legal Foundation* and the Court of Appeals in *Kilroy v. Quarles* leave no meaningful opportunity for public participation.

Public participation was a primary concern of Congress in the Clean Water Act. The congressional declaration of goals and policies includes:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator, or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the State." 33 U.S.C. § 1251(e).

The legislative history of the Clean Water Act emphasizes the importance of the requirements for public participation. The report of the Senate Committee on Public Works on the Senate version of the Act states:

> "An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. This includes the deposit of any permit, and the conditions thereto, in a place of ready public access. The scrutiny of the public and the exercise of authority under this section is extremely important in assuring expeditious implementation of the authority and a high level of performance by all government and discharge sources."

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st session 1490 (1973) (hereinafter cited as Leg. Hist.).

The report of the Committee of Public Works of the House of Representatives on the House version of the bill similarly states:

> "It is with the understanding that steps are necessary to restore the public's confidence and *to open wide the opportunities for the public to participate in a meaningful way* in the decisions of government, that the Committee has included in the proposed legislation various steps to arrive at this goal. First, the Committee has included provisions for public participation in the development, revision and enforcement of any regulation, standard or effluent limitation established by the Administrator or any State under this Act. Not only is this specifically required in section 101(a) [*sic*] but the Administration is directed to encourage this participation. Second, the Committee has included provision in most instances where a determination is to be made by the Administrator or the State, that such determination shall be made as part of a public record." Leg. Hist. at 819 (emphasis added).

It was within this context of the requirement of full public participation in the permit proceedings that Congress provided the exemption from the EIS requirement of NEPA in 33 U.S.C. § 1371(c)(1). There is no justification for applying this provision to preclude the possibility of any meaningful public participation. The concern of Congress was that across-the-board application of NEPA "would increase unnecessarily the administrative burdens of EPA, which will be heavy enough as it is." Leg. Hist. at 182. However, Section 1371(c)(1) also reflects that:

> "The Conferees concluded that it would be sound public policy to extend the applicability of NEPA to two of the Administrator's regulatory responsibilities: the making of grants for the construction of publicly owned waste treatment works and the issuance of permits under Section 402 of the FWPCA to 'new sources' as defined in Section 306.
>
> "The Conferees determined that it would be useful to apply, in the case of waste treatment grants, the requirements of NEPA included in Sections 102(2)(C) and 102(2)(D). Application of these sections would cause the Administrator to consider 'alternative' methods of waste treatment which may have the beneficial effect of decreasing blind reliance on 'secondary treatment' and stimulate more innovative methods of waste treatment." *Id.*

There can be no doubt that Congress intended that projects constructed to provide municipal waste treatment facilities would be evaluated in an EIS. EPA itself acknowledged that the law required that much in a letter from the Administrator to the Office of Management and Budget. Leg. Hist. at 151. In actual practice, however, EPA has found a way to evade this Congressional mandate for projects associated with an existing source. The project is simply made a condition of an NPDES permit for the existing source. Then, according to EPA and the court below, "this condition comes within the exemption [in 33 U.S.C. § 1371(c)(1)]." Appendix A, *infra* at A-3.[3]

[3]An EIS would still be required on the "grant." The preparation of such an EIS, however, would be meaningless with the selected project already locked-in by the NPDES permit. The withholding of a grant, if it is demonstrated in the EIS process that an alternative project should be adopted, hardly achieves the objectives of Congress when the discredited project is implemented nonetheless as a requirement of an NPDES permit.

The result achieved by the courts below is particularly onerous on public participants and contrary to the intent of Congress for projects such as the Hyperion Treatment Plant Interim Sludge Disposal Project which are included in the NPDES permit only by implication. For projects expressly set forth in a permit concerned members of the public may participate in a hearing on the project and present objections, discuss consequences, and propose alternatives during the NPDES permit process. Congress designed the hearing for the NPDES permit to ensure the availability of a meaningful opportunity for members of the public to participate in the permit requirements. Leg. Hist. at 108, 819. To some extent, this process may be considered a substitute for the EIS process.

In this case, however, the permit does not describe the Hyperion Treatment Plant Interim Sludge Disposal Project. To the contrary, it is evident from the face of the permit that at the time the permit was issued the alternative sludge disposal project had not been identified. It was to be described in a future "concept approval." *See* note 1, *supra*. Under these circumstances, there was no possible way to participate meaningfully in the permit proceeding on the critical questions relating to the alternative sludge disposal method. Objections cannot be raised to an unknown project. Neither can its consequences be discussed nor alternatives compared. By inferring a specific project in the general "sludge-out" requirement of the NPDES permit, the Court of Appeals has cancelled both Kilroy's opportunity to present his concerns in a meaningful EIS process and his statutory entitlement to a genuine oppor-

tunity to present his concerns in a meaningful way in the NPDES permit process.[4]

Petitioner Kilroy respectfully submits that the Clean Water Act must be read to provide some opportunity for him to be heard, one way or the other. Either the Hyperion Treatment Plant Interim Sludge Disposal Project must be expressly stated as a requirement of the NPDES permit so that he can effectively present his opposition to that project in the permit proceedings, or the implementation of the project must be delayed until after the requirements of NEPA have been met.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit summarily reversed and remanded for reconsideration in light of the decision of this Court in *Costle v. Pacific Legal Foundation* and the clear require-

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[4]This unfortunate scenario appears to be repeating itself. After the decision of the District Court in this action, an enforcement action was filed against the City of Los Angeles. *United States of America v. City of Los Angeles*, No. CV 77-3047-HP (C.D. Cal. Aug. 12, 1977). Counsel for Kilroy has been informed by the Justice Department that a consent decree in this enforcement action has now been negotiated which establishes a new date of July 1, 1985, for the final termination of the sludge discharge. No alternative disposal method is established. Although a preferred project known as the Hyperion Energy Recovery System is indicated, the decree does not rule out the implementation of any other alternative, including the outrageous trucking and dumping plan which is adamantly opposed by Kilroy. If the new NPDES permit for Los Angeles, which is presently under consideration by EPA, conforms to the consent decree, Kilroy will be faced with the same dilemma. Can he wait until the alternative disposal process (which he may not object to), is finally selected and announced or must he futilely attack all possible alternative disposal systems in the NPDES permit process?

ment in the Clean Water Act that John B. Kilroy, Sr., be provided a genuine opportunity to express in a meaningful way his opposition to the implementation of the Hyperion Treatment Plant Interim Sludge Disposal Project.

Respectfully submitted,

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May, 1980

(Appendices follow)

Appendices

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 77-3844

John B. Kilroy, Sr., Zev Yaroslavsky, Arthur K. Snyder, and John B. Ferraro,
Plaintiffs-Appellants,

v.

John R. Quarles, Jr., in his official capacity as Acting Administrator of the United States Environmental Protection Agency; United States Environmental Protection Agency; Paul DeFalco, Jr., in his official capacity as Regional Administrator, Region IX, United States Environmental Protection Agency; The State Water Resources Control Board; John E. Bryson, in his official capacity as Chairman of the State Water Resources Control Board; Region IV of The California Regional Water Quality Control Board; and Raymond M. Hertel, in his official capacity as Executive Officer of Region IV of the California Regional Water Quality Control Board,
Defendants-Appellees.

City of Torrance, a municipal corporation,
Plaintiff-Intervenor.

[Filed Feb. 25, 1980]

OPINION

Appeal from the United States District Court
for the Central District of California

Before: SNEED and TANG, Circuit Judges, and
CAMPBELL,* District Judge

SNEED, Circuit Judge:

Plaintiffs-appellants, three sometime members of the Los Angeles City Council and one Los Angeles property owner, and plaintiff-intervenor, the City of Torrance, challenge the district court's refusal to grant a preliminary injunction prohibiting defendants-appellees, the Acting Administrator of the United States Environmental Protection Agency (EPA), the agency itself, the agency's regional administrator for the affected region, the California State Water Resources Control Board, its chairman, the affected division of the California Regional Water Quality Control Board, and its executive officer, "from funding, requiring, directing implementation of, or otherwise participating in" a temporary landfill project that disposes of the Los Angeles waste water treatment plant's sludge product. This court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291(a)(1) (1976). We affirm.

The requested preliminary injunction would prevent the EPA's alleged avoidance of the requirement, contained in the National Environmental Protection Act of 1970, 42 U.S.C. § 4321 *et seq.* (1976), that the agency prepare an environmental impact statement (EIS) before taking "major Federal actions significantly affecting the quality

*Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

of the human environment." *Id.* § 4332. The agency action that supposedly falls within the requirement is the inclusion in a National Pollutant Discharge Elimination System (NPDES) permit, issued pursuant to section 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977), *id.* § 1342, of a compliance schedule requiring Los Angeles' Hyperion Waste Water Treatment Plant gradually to abandon its practice of discharging sludge into the ocean. Compliance schedules in NPDES old source permits are exempt from the usual EIS requirement, 33 U.S.C. § 1371(c) (1976), although grants of federal funds by the EPA to help finance projects made necessary by permits are not. The appellants complain that what the EPA has done in issuing this permit is to anticipate a decision that belongs to the grant process, namely, the decision to provide financial aid for a particular project of construction and equipment modification. We find no error, however, in the district court's factual finding that the project was a condition of the permit, and we agree with the holding that this condition comes within the exemption. *Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316, 320-21 (C.D. Cal. 1977). The appellants urge as a separate basis of their appeal that the EPA's alleged adoption of a national policy against ocean disposal of sludge, as reflected in the decision to issue the permit, triggers an EIS requirement. We agree with the district court's admirable discussion of this theory. The denial of the preliminary injunction was therefore a proper exercise of discretion: the district court's reasoning amply demonstrates that the appellants have not shown a likelihood of success on the merits in their suit for a permanent injunc-

tion. *Id.* at 321-38; *see Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

Affirmed.

Appendix B

United States District Court
Central District of California

Civil No. 77-521-HP

Pacific Legal Foundation, et al.,
Plaintiffs,

v.

John R. Quarles, Jr., et al.,
Defendants.

[Filed July 20, 1977]

MEMORANDUM AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Hyperion Wastewater Treatment Plant (Hyperion) is owned and operated by the City of Los Angeles. Each day, Hyperion collects, treats, and disposes of about 350 million gallons of wastewater gathered by a vast underground sewer system serving Los Angeles and adjoining communities. Hyperion currently applies primary treatment to about 250 million gallons of wastewater per day and secondary treatment to the remainder. After treatment the wastewater is separated into effluent and residue, i.e., sludge, and both are discharged into Santa Monica Bay. The effluent is discharged through an underwater pipe or outfall that extends about five miles into the ocean.

The sludge is discharged into the mouth of a deep underwater canyon through another ocean outfall that extends about seven miles into the sea.

Under the Federal Water Pollution Control Act Amendments of 1972 (Water Act), 33 U.S.C. § 1251 et seq., California water polluters are subject to the joint regulatory control of the Environmental Protection Agency (EPA) and the California State Water Resources Control Board (SWRCB). (For convenience future references to the EPA in connection with the regulation of Hyperion will be deemed references to the SWRCB as well.) Asserting authority under the Water Act, the EPA has ordered that Hyperion take steps to apply secondary treatment to all effluent and to cease the discharge of sludge into the ocean.

STATUTORY FRAMEWORK

Ocean pollution is regulated in part by the Water Act and in part by the Marine Protection, Research and Sanctuaries Act of 1972 (Marine Protection Act), 33 U.S.C. § 1401 et seq. The EPA administers both acts. The Water Act covers any discharge of a pollutant into the "navigable waters," which include the "territorial seas,"[1] of the United States plus any discharge from pipes or outfalls regardless of their termination point, 33 U.S.C. § 1362(12), (14). The Marine Protection Act covers pollution from vessels

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[1]The Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

The Water Act defines "territorial seas" as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." § 502(8), 33 U.S.C. § 1362(8).

beyond the territorial seas, 33 U.S.C. §§ 1411, 1402(f). Thus the general demarcation line between the two Acts' jurisdictions, with the exception of pipes or outfalls, is the three-mile limit of the territorial seas.

The Water Act sets out a comprehensive program for the regulation of water pollution into the navigable waters and from outfalls. Section 301 of the Water Act, 33 U.S.C. § 1311, makes "the discharge of any pollutant . . . unlawful" unless the discharger complies with the requirements of that section and several other enumerated sections. Section 301(b)(1)(A) requires that by July 1, 1977, industrial dischargers achieve effluent limitations based on "the best practicable control technology." By July 1, 1977, Section 301(b)(1)(B) and (C) require that publicly owned sewage treatment works meet effluent limitations based on secondary treatment as defined by the Administrator of the EPA or any stricter standard which may be imposed by other state or federal laws or regulations. By 1983, Section 301(b)(2)(A) requires that industrial dischargers meet effluent limitations based on "the best available technology economically achievable." Section 301(b)(2)(B) requires that by 1983, public sewage treatment works apply "the best practicable waste treatment technology." Section 301(e) states that the limitations established under Section 301 shall apply to all point sources of pollutants as defined in Section 502(14), 33 U.S.C. § 1362(14).

Among the most important of the other sections of the Water Act to which Section 301 refers and makes compliance mandatory is Section 402, 33 U.S.C. § 1362, which establishes the National Pollutant Discharge Elimination

System requiring that every polluter obtain a permit from either the EPA or an authorized state-administered program. (Hereafter such permits shall be referred to as NPDES permits.)

Other sections of the Water Act relevant to this litigation include Section 405, 33 U.S.C. § 1345, which requires an EPA permit specifically for the disposal of sewage sludge when such disposal results in pollutants from the sludge entering the navigable waters, and Section 403, 33 U.S.C. § 1343, which requires that any discharge into the ocean must be in compliance with certain EPA promulgated guidelines based on the "degradation" of the waters.

The Marine Protection Act also uses a permit system to regulate the dumping of pollutants from vessels beyond the territorial seas, 33 U.S.C. § 1411. As is true of Section 403, but not of Section 301 of the Water Act, the Marine Protection Act focuses on the harm to the environment caused by the discharge of pollutants into the water. Under the Marine Protection Act, the EPA may grant a permit only if it determines that the dumping will not "unreasonably degrade" the environment, 33 U.S.C. § 1412.

INTERIM SLUDGE DISPOSAL PROJECT AND RELIEF SOUGHT

Pending an ultimate solution to the problem of sludge disposal, an interim sludge project was designed for Hyperion requiring that sludge be centrifugally de-watered and then transported to a sanitary landfill. The EPA contemplates awarding Los Angeles a grant as provided under Sections 201-213 of the Water Act, 33 U.S.C. §§ 1281-1293, to partially fund the interim sludge project. The EPA has also

made a construction schedule for the project a mandatory provision in Hyperion's NPDES permit.

In objecting to the Hyperion interim sludge disposal project, plaintiffs maintain that the EPA is about to cause the expenditure of a great deal of money on a project that will result in substantial land-based environmental consequences, all in reliance on an untested assumption that the disposal of sludge into the ocean is more harmful to the environment than the disposal of sludge on land. Plaintiffs, in their first two causes of action, ask that the interim sludge disposal project be enjoined until the preparation of Environmental Impact Statements (EIS) under Section 102(2)(C), 42 U.S.C. § 4332(2)(C), of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. Plaintiffs contend that two EIS's are required, one for the contemplated EPA grant to fund the interim sludge project and another for the EPA's alleged national policy against disposal of sludge into the ocean. Plaintiffs also seek in their third cause of action a declaration that the Water Act does not prohibit ocean disposal of sludge and that, accordingly, any EIS for the Hyperion interim sludge project should consider ocean disposal as an alternative. The matter is now before the court on plaintiffs' motion for preliminary injunction seeking to restrain defendants from funding or requiring the implementation of the Hyperion interim sludge disposal project.

EIS AS TO THE GRANT

The EPA has stated that it will prepare an EIS for the Hyperion interim sludge disposal project and will also delay the grant of federal funds to Los Angeles for the

project until the EIS is completed. It follows, argues the EPA, that plaintiffs' first cause of action is moot. Plaintiffs argue that their claim is not moot because the EPA still intends to enforce its orders requiring Los Angeles to proceed with the interim sludge project despite the delay in federal funding. Postponing the project pending the completion of the EIS seemed the sensible course until the court confronted the difficult question of how to apply Section 511(c) of the Water Act, 33 U.S.C. § 1371(c), which seeks to define the relationship of that Act to NEPA. Section 511(c) exempts the EPA from preparing an EIS except when a grant of federal funds for construction of publicly owned sewage treatment works or an NPDES permit for a new source of pollution is involved. This section, therefore, exempts the EPA from preparing an EIS when issuing regulations defining secondary treatment and when issuing NPDES permits that apply effluent limitations based on those regulations to particular sewage treatment works. In this case, a construction schedule for the interim sludge project was included as a requirement in the Hyperion NPDES permit. As a condition of the NPDES permit, the construction project is exempt from the EIS requirements of NEPA because the project itself is neither an EPA grant nor a permit for a new source of pollution. *Mahelona v. Hawaiian Electric Co., Inc.*, 418 F. Supp. 1328 (D. Hawaii 1976). Thus the language of Section 511(c) leads to the conclusion that the EPA can, without an EIS, order Los Angeles to build the interim sludge disposal project while the EPA is prevented, until it prepares an EIS, from awarding a grant to help pay for the project. While this result may seem anomalous, the plain

wording of the Water Act specifically limits the EPA's duty to prepare an EIS to the grant alone.

This conclusion is supported by *State Water Control Bd. v. Train*, 424 F. Supp. 146 (E.D.Va. 1976), which held that the enforcement provisions of the Water Act operate independently from the grant provisions. Just as Virginia in that case was not excused from meeting the Water Act's 1977 deadline even though needed federal funding was unavailable, so Los Angeles cannot be excused from complying with its NPDES permit even though needed federal funding will be delayed pending the preparation of an EIS. Although the legislative history of the Water Act is occasionally conflicting as to the scope of the exemption that Section 511(c) provides from the operation of NEPA, the clear purpose of the exemption is to avoid delays, caused by preparation of lengthy EIS's, in implementing the Water Act's goals.[2]

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[2]The Conference Report describes Section 511(c) as follows:

"Section 511(c) clarifies certain relationships between the Federal Water Pollution Control Act (FWPCA) and the National Environmental Policy Act (NEPA).

The Federal Water Pollution Control Act Amendments of 1972 charge the Administrator of EPA with a comprehensive mandate to regulate the discharge of pollutants into the waters of the United States. The sole purpose of the Act is the enhancement of environmental quality. In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations. With respect to each of these actions, the Act provides Congressional guidance to the Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others. The Act seeks to guide the Administrator, to the extent possible, in the matter of assigning relative weight to the many factors that he must consider.

EIS AS TO THE NATIONAL POLICY AGAINST SLUDGE IN THE OCEAN

In its Answer, the EPA has admitted that it endorses a national policy to eliminate the disposal of sludge into the ocean. The plaintiffs argue that the implementation of this national policy constitutes a major federal action having significant environmental consequences so as to require the preparation of an EIS. Assuming *arguendo* that under the facts of this case the implementation of this particular policy qualifies as an "action" under NEPA, as interpreted by *Kleppe v. Sierra Club*, 427 U. S. 390, 96 S. Ct. 2718 (1976), this court concludes that plaintiffs' request for injunctive relief cannot be supported on the ground that—without benefit of an EIS—the EPA is implementing this no-sludge policy.

If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded."

S. Conf. Rep. No. 92-1236, in 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (compiled for the Senate Comm. on Public Works by the Library of Congress), Ser. No. 93-1, p. 332 (1973) (hereafter Leg. Hist.).

At the final Senate debate, Senator Muskie submitted an exhibit stating that:

"The purpose of this bill is to set rapidly in motion an effective water pollution control program. The Act sets tight time limits within which the Administrator must take a multitude of actions, each heavily dependent on the other, that will, in the aggregate, produce a meaningful, effective, and truly workable program as quickly as possible. Should the Administrator find himself confronted with substantive or procedural requirements extraneous to this Act, the very program that the Act seeks to establish would be imperiled.

* * *

This Act specifically identifies factors to be considered by the Administrator in making this kind of balancing analysis and the Conferees concluded that the substantive purposes and procedures of the Act fully satisfy and go far beyond what

Plaintiffs claim that the national policy prohibiting sludge disposal into the ocean is not exempted from NEPA's EIS requirements by Section 511(c) of the Water Act because this no-sludge policy is not an action taken by the EPA pursuant to the Water Act, but is instead an administrative decision "ultra vires" the Water Act. Insofar as the challenged national policy pertains to dumping of sludge into the territorial seas and discharging of sludge from ocean outfalls—areas of ocean pollution covered by the Water Act—the EPA contends that this policy is not only promulgated pursuant to the Water Act but mandated by Section 301 of the Act that requires public treatment works to apply secondary treatment techniques to their effluent discharge. The application of secondary treatment as defined in 40 C.F.R. Part 133 would, of necessity, eliminate the discharge of sludge. Plaintiffs attempt to rebut this contention by arguing that Section 301 does not apply to deep ocean outfall discharge because such discharge can

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is required by 102(2)(b) [of NEPA] and would be frustrated if other factors were to be injected into the decisions of the Administrator by NEPA."

1 Leg. Hist. at 182.

The legislative history further reveals that the primary stimulus for Section 511(c) was a desire to insulate NPDES *permits* from EIS requirements. See, e.g., the letter from William Ruckelshaus, Administrator of the EPA, to the Office of Management and Budget, recommending presidential approval of the bill, stating that the exemption in 511(c) "is in response to Administration urging to remove a major obstacle from the efficient functioning of the permit program." 1 Leg. Hist. at 151. Debate on Representative Abzug's proposed amendment to the House bill reveals that difficulties encountered in enforcing the permit system under the Refuse Act led to Congressional concern over the application of NEPA's EIS requirements to the NPDES permit system. 1 Leg. Hist. at 536-539; also see the remarks of Senator Hart upon the Senate consideration of the Conference Report, October 4, 1972, 1 Leg. Hist. at 210.

be regulated only under Section 403 which sets out special criteria for the ocean disposal of pollutants. Underlying the statutory interpretation question of whether Congress intended Section 301 or Section 403 to apply to ocean discharging sewage plants is a serious dispute regarding the regulatory policy to be applied to ocean pollution. Section 301 deals with the technological control of pollutants at their source, without regard to their effect on the immediate environment, while Section 403 speaks to a system of pollution control based on a study of the effects of pollutants on the marine ecology. Thus the EPA, arguing in favor of Section 301's application wants the strict technological standards—clearly applicable to the pollution of inland waters—to apply as well to ocean pollution regulated by the Water Act, i.e., to pollution within the territorial seas and through outfalls. Plaintiffs, arguing for Section 403's exclusive application to ocean pollution regulated by the Water Act, want, instead of strict rules, a case-by-case balancing analysis of pollution controls based on ecological needs of particular marine locales.

Sections 301 and 403 of the Water Act, manifesting two different philosophies of pollution control, exist side by side with no explanation of their intended relationship, i.e., whether the more general section, 301, should defer to the more specific, 403, or whether both sections and their inherent philosophies are meant to apply concurrently. In arguing that Section 403 controls, plaintiffs first assert that Congress intended a different scheme of regulation for deep ocean outfalls and deep ocean dumping, from the scheme intended for navigable waters. The "end-of-pipe" technological scheme of Section 301, argue plaintiffs, was

intended to apply only to the navigable waters. In support of their argument plaintiffs point out that Section 301(b) provides that effluent limitations are to be achieved by certain specified dates, "to carry out the objective of [the Water Act]," and that Section 101(a)(1), 33 U.S.C. § 1251(a)(1), provides that, "The objective of [the Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . . (1) it is the national *goal that the discharge of pollutants into the navigable waters* be eliminated by 1985." (Emphasis added.) Plaintiffs then point out that the only specific mention of a goal for waters beyond the navigable waters is in Section 101(a)(6) which sets forth a "national policy that a major research and demonstration *effort be made to develop technology necessary to eliminate the discharge of pollutants into* the navigable waters, waters of the contiguous zone, and *the oceans.*" (Emphasis added.) The slight difference in the generally stated goals for navigable waters and for the oceans that can be extracted from comparing Sections 101(a)(1) and 101(a)(6) forms a weak basis for the conclusion that Section 301, which on its face appears to cover all water pollution within the jurisdiction of the Water Act, was not meant to apply to pollution of the ocean seas through deep ocean outfalls.

Plaintiffs attempt to bolster their argument that Section 403's standards control by referring to legislative history indicating that Congress intended that the regulation of ocean dumping under the Water Act be consistent and uniform with the regulation of ocean dumping under the

Marine Protection Act.[3] Under the Marine Protection Act the EPA may grant permits for deep ocean dumping from vessels only when it "determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. § 1412. A goal of uniform treatment of ocean dumpers, plaintiffs argue, would explain why Section 403, the only section of the Water Act specifically dealing with permits for ocean pollution, provides that the reference point for regulation shall be "degradation of the waters." The argument for uniformity in regulation of ocean dumping under the Marin Protection Act and the Water Act is not entirely consistent with plaintiffs' argument that Section 301's reach is limited to "navigable waters."[4] Under the latter argument, since

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[3]At the Senate debate on S. 2770, November 2, 1971, Senator Magnuson explained the relationship of the Marine Protection Act and the Water Act as follows:

> "[T]he committees have agreed that the regulation of discharges of pollutants within the territorial and internal waters of the United States will be governed by the provisions of S.2770 [the Water Act]. Beyond the territorial sea, in the contiguous zone and other high seas areas of the oceans, the regulation of transportation for dumping and dumping of materials originating in the United States will be governed by the provisions of H. R. 9727 [the Marine Protection Act]. I want to state for the record that the two committees have worked closely together to reach this understanding and to achieve uniformity as to the dumping criteria, enforcement, and penalty provisions of the two bills."

2 Leg. Hist. at 1380.

[4]Under plaintiffs' navigable-waters argument, the three-mile limit would mark the point where regulation under Section 301 would end and regulation under Section 403 (as to deep ocean outfalls) or the Marine Protection Act would begin. Under plaintiffs' uniformity-of-ocean-dumping-regulation argument the coastline would mark the point where regulation under Section 301 would end and regulation under 403 (as to dumping within the territorial seas and all outfalls) or the Marine Protection Act would begin.

ocean dumping within the three-mile limit of the territorial seas would constitute dumping into navigable waters, such dumping would be subject to the requirements of Section 301 rather than Section 403 alone, thus precluding uniformity of treatment of ocean dumpers under the Water Act and the Marine Protection Act since at least some ocean dumpers would be subject to the strict technological control of Section 301 rather than the degradation standard of Section 403 and the Marine Protection Act.

Plaintiffs also point to legislative history apparently indicating that Congress intended Section 403 rather than Section 301 to regulate ocean dumping.[5] This legislative history does not, however, affirmatively rule out the possibility that Section 403's requirements may apply in addition to Section 301's. Furthermore, this legislative history should be read in proper context. Section 403 served as the focal point for the resolution of the overlapping

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[5]Upon the Senate consideration of the report of the conference, October 4, 1972, Senator Muskie submitted an exhibit containing the following remarks:

> "The Conferees intend that Section 403 regulate the discharge of any pollutants subject to this Act from any outfall sewer regardless of where that sewer ends and from any vessel within the three mile limit, any other legislation to the contrary notwithstanding."

1 Leg. Hist. at 177.

A similar reference to Section 403 is found in Senator Hollings remarks at the Senate debate on S. 2770, November 2, 1971:

> "The operative provisions of the agreement [between the Committees on Commerce and the Public Works as to jurisdiction over ocean pollution] are that the discharge of pollutants from outfalls, vessels, or any other source, within the internal or territorial waters of the United States will be governed by the [Water Act]. The regulation of such discharges will be through a permit program, applying discharge criteria provided in Section 403 of the act."

2 Leg. Hist. at 1381.

jurisdictions of two congressional committees, the Committee on Public Works and the Committee on Commerce. The Senate Report reflects an agreement that the Water Act, to be reported from the Committee on Public Works, would regulate the pollution of the navigable waters, including the territorial seas, plus pollution through outfalls regardless of where the outfall ends, while the Marine Protection Act, to be reported from the Commerce Committee, would regulate pollution beyond the territorial seas with the exception of outfalls. Thus references in the legislative history to regulation of ocean dumping under Section 403 may be interpreted as standing for the proposition that the Water Act and not the Marine Protection Act regulates outfalls and the territorial seas, rather than for the proposition that Section 403 and not Section 301 of the Water Act regulates outfalls and the territorial seas.

Plaintiffs next argue the comparative uselessness of Section 403 if Section 301 already applies to all ocean pollution covered by the Water Act. Plaintiffs point out that wastewater effluent, after receiving secondary treatment, is nearing the quality of drinking water, and thus unlikely to require additional treatment to avoid the "unreasonable degradation" of ocean waters. While the argument that Section 403 will in practice be superfluous may well be true with regard to sewage treatment plants, situations may well arise with industrial polluters in which Section 301's requirement of the "best practicable" treatment methods may not be enough to prevent the industrial discharge from unreasonably degrading the ocean environment.

Plaintiffs also argue that the application of Section 301 to sewage sludge disposal would make Section 405 of the Water Act, 33 U.S.C. § 1345, superfluous. Section 405 is the only substantive section of the Act specifically dealing with sludge disposal. The wording of the Act and the legislative history clearly indicate, however, that Section 405 was not intended to be the primary source of regulation of sludge but was intended as a cautionary measure to provide additional protection against dangers to navigable waters caused by disposal methods unregulated by Section 301—careless land disposal and deep ocean dumping of sludge from vessels.[6]

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[6]Senator Muskie's exhibit presented during the Senate consideration of the report of the conference, October 4, 1972, refers to Section 405 as follows:

> "The Conferees have included a provision, not in either bill, which relates to the disposal of sewage sludge from waste treatment plants. During the Conference it became apparent that, unless a regulatory mechanism was established to control the by-products of advanced waste treatment plants, the disposal of residual sludge could cause a serious problem. Present practices which permit sewage sludge to be hauled out to sea and dumped or placed in areas on land where it is washed into streams and lakes, without regard to the impact on health and welfare, recreation, fish and shellfish and wildlife, are unsatisfactory.
>
> Under Section 405, . . . disposition of sewage sludge in any manner which might affect the inland or coastal navigable waters would be prohibited (either by dumping sludge on land in such a fashion as to run off into waters or dumping in the ocean in such a manner as would have it returned into territorial waters)."

1 Leg. Hist. at 170-71.

Senator Boggs who originally introduced Section 405 made the following remarks at the Senate consideration of the conference report, October 4, 1972:

> "[S]ection 405 of the conference report establishes a special procedure controlling the disposal of sewage sludge. This section covers several possible situations. For example, it would require an EPA permit if the sludge is deposited on land,

The legislative history, although not conclusive, on balance supports the interpretation now urged by the EPA.[7] The only detailed statement in the legislative history speaking directly to the regulation of sewage outfalls was made by Representative Harold T. Johnson of California, one of the House conferees. Mr. Johnson's understanding of the Water Act clearly regards ocean-discharging sewage plants as subject to the secondary treatment requirements of Section 301.[8] The Senate Report also contains a brief statement that Section 403's requirements apply in

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and there is a possibility that the sludge may run off into a river.

Or it would require an EPA permit if sludge is dumped anywhere at sea, and there is a likelihood that currents would sweep the sludge back into the navigable waters of the United States."

1 Leg. Hist. at 212.

[7]The EPA, itself, has not been completely consistent in its approach to ocean pollution under the Water Act. Until the recent revision of the Marine Protection Act ocean dumping regulations, 42 Fed. Reg. 2462 (1977), the EPA had applied the same set of regulations to outfalls and all ocean dumping under both the Water Act and the Marine Protection Act. The EPA stated that the regulations, as they were directed to outfalls, were based on Section 403, with no mention of the applicability of Section 301. The court also notes an inconsistency in the EPA's argument here that Section 301's secondary treatment requirements apply to the disposal of sludge via ocean outfalls when the EPA has set dates for the cessation of ocean sludge disposal at Hyperion beyond July 1, 1977, the date by which Section 301 mandates the application of secondary treatment.

[8]Representative Harold T. Johnson made the following remarks at the House consideration of the report of the conference on October 4, 1972:

"In defining the term 'secondary treatment'. . . the Administrator has the discretion to find that the 'secondary treatment' requirement is met by alternative means. For example, in the case of deep ocean water discharges through ocean outfalls, the Administrator could determine that 'secondary treatment' requirements are met in that situation where the discharges have first, received primary treatment, second, complied with regulations governing the discharge of heavy metals and other toxic substances and, third, where the publicly owned agency

addition to the requirements under Title III of the bill (now subchapter III which includes Section 301).[9]

The EPA urges that the wording of the Water Act compels the application of Section 301 to ocean pollution. Section 301(a) states that the discharge of pollutants is unlawful unless in compliance with certain listed sections of the Act. The listed sections do not include Sections 403 and 405, evidence, argues the EPA, that those sections were regarded by the drafters as supplementary rather than primary requirements. The Court also notes that Section 301(e) provides that 301's "Effluent limitations . . . shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of this chapter."

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has demonstrated that such ocean discharges are not inconsistent with the purposes of the act and do not harm or endanger the diversity, productivity and stability of the marine ecosystem.

It would be wasteful of public funds to define 'secondary treatment' in such a fashion as to require expensive facilities to achieve a degree of treatment which, under the practical circumstances existing, would be unnecessary.

The discretion conferred upon the Administrator should be exercised by him only after he has determined that whatever processes or action constitute 'secondary treatment' conform with and are consistent with the objectives of the act, and that they are technically and economically feasible. Moreover, I believe that any publicly owned system bears the burden of demonstrating to the Administrator that this will be the case."

2 Leg. Hist. at 1266-67.

[9] "[F]or those classes and categories of point sources which will discharge into the territorial seas, the waters of the contiguous zone and the waters of the ocean. . . . the Administrator [of the EPA] (in addition to requirements under Title III) is required to apply guidelines established by regulation for determining the effect on the territorial sea, the waters of the contiguous zone and the waters of the ocean under Section 403."

S. Rep. No. 92-414, 92nd Cong., 1st Sess. (1971); 2 Leg. Hist. at 1490.

(Emphasis added.) The definitions of "point source" and "discharge of a pollutant" cover the disposal of sludge into the ocean via outfalls or vessels, see Section 502(6), (12), (14), 13 U.S.C. § 1362(6), (12), (14). The Senate Report indicates that the drafters of the Senate bill had outfall discharge specifically in mind when writing Sections 301(e) and 502(12).[10]

At many points, the legislative history of the Water Act indicates Congress' intention that Section 301's effluent limitations apply across-the-board to all sources of pollution covered by the Act.[11] Senator Muskie summed up the "three essential elements" of the Water Act, differentiating it from past unsuccessful water pollution legislation: Uniformity, finality, and enforceability." (Senate consideration of the report of the conference committee,

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[10]"The Committee has also added a definition of the term discharge to indicate the scope of the control requirements under the Act. Any pollutant added to the navigable waters from any point source or the addition of any pollutant to the contiguous zone or the water of the ocean by outfall or other pipeline is included within the control requirements of Title III. . . ."

Id., 2 Leg. Hist. at 1495.

[11]See, e.g., Senator Muskie's remarks that advanced wastewater treatment "will be required for *every* community in the Nation." 1 Leg. Hist. at 165 (emphasis added); the Senate Report's statement that "*All* publicly owned treatment facilities must utilize secondary treatment. . . ." 2 Leg. Hist. at 1460 (emphasis added); also see the Conference Report's statement on uniformity:

> "Except as provided in Section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."

1 Leg. Hist. at 309.

October 4, 1972, 1 Leg. Hist. at 162). Under the plaintiffs' interpretations of the relationship between Sections 301 and 403, see n. 4, either industrial point sources and sewage treatment plants discharging pollutants into the ocean would be subject to an entirely different system of regulations from dischargers into inland waters, or deep ocean outfalls would be regulated under an entirely different system from all other sources of pollution covered by the Water Act. Had Congress intended such major distinctions, the Water Act could easily have been drafted to reflect them.

The overall policy emphasis of the Water Act is not difficult to discern. The Water Act focuses primarily on the technological control of pollution at its source rather than on the achievement of water quality standards for receiving waters. As described by Mr. Justice White, the Water Act's

> direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.

EPA v. State Water Resources Control Board, 426 U.S. 200, 204-205 (1976) (footnotes omitted).

Surely, when Congress adopted a regulatory philosophy of strict end-of-pipe regulation, if an exception was in-

tended for ocean polluters or deep ocean outfalls such an exception would have been specifically referred to in either the statutory language or the legislative history. The court is satisfied that a reasonable interpretation of the Water Act requires that Section 301 and Section 403 apply *concurrently* to all ocean pollution within the jurisdiction of the Act, i.e., to obtain an NPDES permit an ocean polluter must meet both the technological control requirements of Section 301 and the ocean degradation criteria of Section 403.

The court concludes that by Section 301 of the Water Act Congress mandated the application of secondary treatment to sewage plant discharge within the territorial seas or through outfalls. Under the regulations defining secondary treatment, 40 C.F.R. Part 133, sludge is prohibited. Obviously, no EIS is required on the Congressional mandate to require secondary treatment for all sewage plants. Nor is an EIS required for the EPA's issuance of regulations defining secondary treatment because such action is exempt from EIS requirements under Section 511(c) of the Water Act. The court further rules that even if Section 301 were not applicable to ocean pollution, an EIS would still be unnecessary. Plaintiffs concede that Section 403 gives the EPA the *power* to regulate the disposal of pollutants into the territorial seas and from outfalls. Therefore, even if the EPA incorrectly interpreted the Water Act and applied wrong standards to the regulation of ocean pollution under the Water Act, the EPA's decision is still one made "pursuant to" the Water Act and thus within the NEPA exclusion of Section 511(c). The exemption granted by

511(c) would have little effectiveness if every time the EPA is alleged to have abused its discretion in administering the Water Act or to have incorrectly interpreted the law, the EPA's action would lose its Section 511(c) exemption. To correct abuses of discretion and misapplication of Water Act provisions, review procedures exist under the Water Act, 33 U.S.C. §§ 1365, 1369, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Direct review of the EPA's alleged mistakes in administering the Water Act is much more appropriate than indirect review under the guise of an EIS.

Plaintiffs finally argue that Section 511(c)'s exemption from NEPA's EIS requirements cannot entirely insulate a national no-sludge-in-the-ocean policy because that policy covers matters beyond the scope of the Water Act, specifically the dumping of sludge from vessels beyond the territorial seas. The instant motion seeks injunctive relief against EPA Water Act orders concerning discharge through ocean outfalls. Since no injunctive relief is sought against any order under the Marine Protection Act prohibiting vessel dumping of sludge into the open seas, a national policy prohibiting such dumping is only relevant to this litigation because the EPA has refused to consider vessel dumping of sludge as an alternative to outfall discharge of sludge prohibited by the EPA in enforcing the Water Act. In this limited context, the court concludes that the EPA is not required to consider deep ocean vessel dumping as an alternative to land disposal of Hyperion's sludge. Having so concluded, the second cause of action

seeking an EIS on the national no-sludge-in-the-ocean policy has no further relevance to this motion.[12]

To effectively implement Congressional policies, application of the Water Act and the Marine Protection Act must be harmonized. Legislative history indicates that Congress intended the two acts to operate as a comprehensive, long-range regulatory scheme aimed at eventually ending all water pollution.[13] Between the Marine Protection

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[12]The court is not entirely unsympathetic to plaintiffs' dissatisfaction with an EIS on the Hyperion project that only considers land-based environmental effects, but the court is persuaded that Congress intended to free the EPA from the burden of reconsidering and reevaluating all of its water quality mandates and policies each time it prepares an EIS for a sewage treatment plant grant.

Senator Buckley, at the Senate consideration of the Conference Report, October 4, 1972, objected to the scope of Section 511(c) because he foresaw that the reexamination of the EPA's general standards and guidelines would not be required in preparing an EIS under the Water Act. Speaking of the EIS requirement for new sources of pollution, Buckley noted that "under Section 511(c)(2) the only issue left for exploration in the impact statement in such cases would apparently be non-water quality considerations."
1 Leg. Hist. at 195.

[13]

> "The framework [of Sections 301, 402, and 403 of the Water Act] is in concert with the ultimate objective of the Act to eliminate the discharge of pollutants.
>
> The Committee [on Public Works] shares equally jurisdiction with the Senate Commerce Committee over the disposal of pollutants from vessels beyond the territorial seas. . . . Both committees have held hearings on the subject of ocean degradation. There can be no doubt that there is presently serious deficiency that exists in present law that must be repaired if this Nation is to lead in the protecting the quality of the ocean.
>
> In order to expedite the legislative process, the Committee on Public Works and the Committee on Commerce have jointly agreed on a bill to provide the regulatory framework to control the dumping of pollutants from vessels into the waters beyond the territorial seas.
>
> • • •
>
> Coupled with the provisions in the bill reported by the Committee on Public Works [the Water Act], the bill to

Act and the Water Act, the EPA is given the authority, to the full extent of the jurisdiction of the United States, to regulate and ultimately to eliminate pollution of the oceans. Given the Marine Protection Act's stated purpose of encouraging the development of "means of minimizing or *ending* all dumping of materials within five years of the effective date of this Act [April 23, 1973]" 33 U.S.C. § 1443 (emphasis added), it is difficult to say that the Marine Protection Act provides no basis for an EPA policy against dumping of sludge into the deep oceans. It would mock Congress' long-range comprehensive goal of water quality improvement to require the EPA to order the cessation of sludge disposal from a deep ocean outfall while requiring the EPA to consider, as an alternative disposal method, the dumping of this same sludge by vessel into the deep ocean at the pipe's end or at any other place on the face

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reported from the Commerce Committee [the Marine Protection Act] should enable the United States to have complete and integrated regulation of the disposal of pollutants into all waters and over all sources of pollutants subject to its jurisdiction. It is expected that the leadership so exercised by the United States will be the model for other nations and should in a short time produce the framework for international agreement over the protection of the oceans.

* * *

The ocean's waters are in constant circulation, so that any discharge beyond any arbitrary limit, such as 3 or 12 miles, may reach the beaches of the United States. Thus, in considering the discharge effects, the Administrator [of the EPA] must consider the effect that the discharge may have elsewhere on the integrity of the marine systems.

. . . [T]he Committee wishes to emphasize the need to preserve the ocean in as natural a state as possible at least until we understand its tolerances and characteristics, so that discharges permitted today will not irreversibly modify the oceans for future uses."

S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971); 2 Leg. Hist. at 1492-93.

of the waters. Congress' desire to restore and maintain the integrity of all waters over which this nation has jurisdiction was the moving spirit behind the Water Act and the Marine Protection Act. This spirit directs that as long as there exists a practical land disposal method, the EPA need not evaluate the alternative of deep ocean dumping when it formulates conditions for an NPDES permit or when it authorizes a grant of federal funds to develop a project designed to achieve compliance with the Water Act.

The Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties appearing in this cause.

Dated: July 20, 1977.

/s/ HARRY PREGERSON
Harry Pregerson
United States District Judge

Appendix C

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 77-0521 HP

PACIFIC LEGAL FOUNDATION, ET AL., PLAINTIFF

v.

JOHN R. QUARLES, JR., ET AL., DEFENDANTS

AFFIDAVIT OF PAUL DE FALCO, JR.

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN FRANCISCO)

Paul De Falco, Jr. being duly sworn, deposes and says:

1. I am the Regional Administrator, Region IX, United States Environmental Protection Agency (EPA), San Francisco, California. In my capacity as Regional Administrator, I am the chief executive officer for EPA in Region IX and am responsible for administration of EPA's programs in Arizona, California, Hawaii, Nevada, Guam, American Samoa, and the Trust Territories.

2. Under Title II of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1281 *et seq.*, the Administrator of EPA is authorized to award grants to municipalities for construction of wastewater treatment facilities. The authority of the Administrator of EPA to award grants under Title II of FWPCA has been delegated by the Administrator to the Regional Administrators of EPA.

3. Under an agreement signed May 23, 1975, general administration of the construction grant program of Title II of FWPCA was delegated to the California State Water Resources Control Board (SWRCB). The agreement, however, did not delegate to the SWRCB the actual authority to award Federal construction grants. The final decision making authority for award of Federal construction grants in California is thus my responsibility as Regional Administrator.

4. On August 22, 1975, the City of Los Angeles submitted an application for a grant under Title II of FWPCA, for construction of an interim sludge processing and disposal system for the Hyperion treatment plant. The City had previously submitted a Project Report to EPA in 1975 which discussed the feasibility of the Interim Sludge Project.

5. The proposed Interim Sludge Disposal Project is designed to eliminate the discharge of sewage sludge to the ocean from the Hyperion plant until an ultimate solution for the disposal of sludge is developed. The City of Los Angeles is presently a participant in a cooperative effort with Los Angeles County and Orange County to develop a facilities plan and joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) regarding alternatives for the ultimate disposal of sewage sludge. This effort is partially funded by a grant from EPA under Title II of FWPCA.

6. In accordance with EPA's Guidelines for Compliance with NEPA in the Title II Wastewater Treatment Works Construction Grants Program (40 C.F.R. § 6.512), EPA prepared an Environmental Impact Appraisal for the Interim Sludge Disposal Project which was issued on November 18, 1976. (Attachment Q, Memorandum in Support of Motion To Dismiss). The Environmental Impact Appraisal contained a discussion of the anticipated impact of the project on the environment, a discussion of mitigation measures to be taken, and a dission [*sic.*] of alternatives to the proposed project.

7. On the basis of the Environmental Impact Appraisal and the EIR prepared by the City of Los Angeles, EPA issued a Negative Declaration on November 18, 1976, regarding the environmental impact of the Hyperion interim sludge project. (Attachment P, Memorandum in Support of Motion to Dismiss). The Negative Declaration stated that it was EPA's conclusion that the proposed project would not have significant environmental impacts and that EPA had made a preliminary decision not to prepare an Environmental Impact Statement.

8. The City of Los Angeles is presently developing a facilities plan covering all aspects of future wastewater treatment, which is referred to as the City of Los Angeles Wastewater Facilities Plan. This plan will include a detailed discussion of alternative means of achieving effluent limitations based upon secondary treatment at the City's existing treatment facilities and a discussion of the Interim Sludge Disposal Project. The City and EPA are also developing a joint EIR/EIS covering the environmental impact of the City of Los Angeles Wastewater Facilities Plan. Preparation of the plan and the joint EIR/EIS is partially funded by a grant from EPA under Title II of FWPA.

9. The EIR/EIS for the City of Los Angeles Wastewater Facilities Plan will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project and a discussion of the environmental impacts of the present disposal of sludge to the ocean.

10. In view of the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal, I have decided that EPA should not award a grant to the City of Los Angeles for construction of the project until the public has had a further opportunity to comment on the environmental impact of the project. I have, therefore, directed that no action should be taken on the grant application submitted by the City of Los Angeles for the Hyperion Interim Sludge Project until the requirements of the National Environmental Policy Act have been satisfied with respect to the EIR/EIS for the City of Los Angeles Wastewater Facilities Plan.

/s/ Paul De Falco, Jr.
PAUL DE FALCO, JR.

Subscribed and sworn to before me this 18th day of April, 1977.

/s/ Melinda Taflin
Notary Public
My Commission expires July 6, 1980.

Supreme Court, U. S.
FILED
JUN 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1746

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN B. KILROY, SR., PETITIONER

v.

DOUGLAS M. COSTLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 614 F. 2d 225. The opinion of the district court (Pet. App. B1-B24) is reported at 440 F. Supp. 316.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1980. The petition for certiorari was filed on May 3, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied a preliminary injunction to prevent EPA from enforcing a compliance schedule without preparation of an environmental impact statement.

STATUTES INVOLVED

Pertinent portions of 33 U.S.C. 1371(c)(1) and 42 U.S.C. 4332(2)(C) are set out at pages 3 and 4 of the petition.

STATEMENT

This is yet another effort by petitioner to defeat a project once proposed by the City of Los Angeles to curtail sewage-sludge discharges into the Pacific Ocean. In *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), petitioner and others—ultimately without success sought to defeat the project by invalidating an NPDES permit on the ground that it was issued in violation of the public-participation requirements of the Clean Water Act, 33 U.S.C. (and Supp. II) 1251 *et seq.* In the present case, petitioner (represented by Pacific Legal Foundation) seeks to invalidate the permit on NEPA grounds.

The background is the same as in *Costle*. The City of Los Angeles owns and operates the Hyperion Wastewater Treatment Plant located in Playa Del Ray, California. Since 1960, that plant has processed most of the City's sewage, and discharged the wastes through three "outfalls" into the Pacific Ocean. Under Section 402 of the Clean Water Act, 33 U.S.C. (and Supp. II) 1342, EPA and the State of California Regional Water Quality Control Board have issued a series of permits allowing the City to discharge wastes from this plant into the Pacific Ocean. One such permit, issued on August 18, 1975,

conditioned continuing discharges from the Hyperion Plant on compliance by the City with a schedule designed to achieve full secondary treatment[1] of wastewater by October 1, 1979, and the gradual elimination of the discharge of sludge into the ocean over a 30-month period following "concept approval" of a plan for alternative disposal of the sludge. On January 24, 1977, the expiration date of the permit was extended to June 30, 1977, and on June 2, 1977, the expiration date was extended to December 17, 1979. See *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 6-12.[2]

The permit, as extended, required the City to phase out sludge discharges into the ocean. The permit also set interim compliance dates for completion of the plans and specifications and commencement of construction of interim sludge-handling facilities (see Pet. 5-6 n.1). The permit, however, left to the City the nature and details of the interim project.

On February 4, 1977, petitioner, the Pacific Legal Foundation, and others sued EPA, the State Water Resources Control Board, and other state and federal

---

[1]"Primary treatment" of sewage includes relatively simple processes, such as settling solids out of the sewage, screening out floatable objects, and removing oil and grease. "Secondary treatment" removes a higher percentage of solids by methods such as anaerobic digestion. Pursuant to Section 301(b)(1)(B) of the Clean Water Act, 33 U.S.C. 1311(b)(1)(B), publicly owned treatment plants were generally required to achieve effluent limitations "based on secondary treatment" by July 1, 1977. See *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 2-3.

[2]In that case, the Ninth Circuit found procedural errors in the June 2, 1977, extension of the permit. As a result, the court stayed the compliance schedules incorporated in the permit, though leaving in effect those requirements which were in effect on January 1, 1977. See 586 F. 2d 650. This Court reversed in *Costle* v. *Pacific Legal Foundation*, *supra*.

defendants to enjoin the interim sludge project on the ground that EPA should have prepared an environmental impact statement before requiring the construction of an interim sludge project. On March 29, 1977, the plaintiffs filed a motion for a preliminary injunction to enjoin EPA "from funding, requiring, directing implementation of, or otherwise participating in the Interim Hyperion Sludge Management Project" without first preparing an environmental impact statement. They also sought the same relief against "all persons to whom knowledge of this injunction shall come * * *." On April 18, 1977, the EPA voluntarily agreed to prepare an EIS before funding the interim project (Pet. App. C1-C5), but EPA refused to eliminate the requirement in the permit that Los Angeles construct interim sludge-handling facilities in accordance with the specified schedule. As for all aspects other than funding, the district court denied an injunction (Pet. App. B1-B24). The court found that Section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c), expressly exempts NPDES permits from the requirement of an EIS and, therefore, EPA may properly require the City to carry out an interim sludge-disposal project without first preparing an EIS (Pet. App. B6-B7).[3] The court of appeals affirmed (Pet. App. A1-A4).

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[3]The plaintiffs had also sought a preliminary injunction against EPA's policy to eliminate the disposal of sludge in the ocean. The court found that Section 301 of the Act, 33 U.S.C. (and Supp. II) 1311, applies to sewage treatment plants discharging into the contiguous zone, and that all such plants are subject to at least secondary treatment under the Act. The court denied an injunction (Pet. App. B8-B24).

On October 14, 1977, the petitioners filed a motion requesting the district court to reconsider its denial of the preliminary injunction. After briefing, the district court affirmed its previous decision.

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of another court of appeals or of this Court. In addition, a pending settlement of the government's enforcement action against the City of Los Angeles has eclipsed whatever significance this case might otherwise have had.

1. Section 511(c)(1) of the Clean Water Act, 33 U.S.C. 1371(c)(1), states that, with the exception of grants for the construction of public treatment works and the issuance of NPDES permits for new sources, "no action of the Administrator taken [under the Act] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." Plainly, the conditions in the NPDES permit requiring the City of Los Angeles to phase out the discharge of sewage sludge into the Pacific Ocean were neither a grant for a treatment works nor a permit for the discharge from a new source. Accordingly, no EIS was required for those conditions.

The NPDES permit also required the City to adhere to a schedule for the construction of interim sludge handling facilities (Pet. 5-6 n.1). That schedule merely required that some facilities be constructed in accordance with the schedule as a means of assuring prompt compliance with the prescribed schedule. Once again, under the language of Section 511(c), the construction schedule for the carrying out the interim project does not require the preparation of an EIS because it is neither a grant nor a new-source permit.

One purpose of the broad exemption in Section 511(c) was to assure that the deadlines set out in the Clean Water Act would not be delayed by the time required to

prepare and consider environmental impact statements. The Conference Committee Report on the Federal Water Pollution Control Act Amendment of 1972 stated:[4]

> The sole purpose of the Act is the enhancement of environmental quality. In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations. With respect to each of these actions, the Act provides Congressional guidance to the Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others. The Act seeks to guide the Administrator, to the extent possible, in the matter of assigning relative weight to the many factors that he must consider.
>
> If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded.

With regard to publicly owned treatment works, Section 301(b)(1)(B) set July 1, 1977, as the deadline for the achievement of secondary-treatment standards. The discharge of sludge by the City of Los Angles violates the secondary-treatment requirement and should have ended by July 1, 1977. See 40 C.F.R. 133.102.[5] Preparation of

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[4]Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 332 (Comm. Print 1973).

[5]Sludge violates the component limitations of the secondary-treatment regulations.

an EIS prior to the phasing out of that discharge would have had the effect of delaying the congressionally mandated deadline and was therefore not required.[6]

To be sure, in Section 511(c) Congress prescribed an EIS prior to federal funding of any publicly owned treatment works. But EPA was authorized to require the City to obey the compliance schedule without regard to whether EPA would fund the interim sludge project or any other project. EPA's decision to do so in this case was not a funding decision. It was simply an imposition of permit conditions. Section 511(c) could not be clearer that no EIS was required. See *State Water Control Board* v. *Train*, 559 F. 2d 921, 924 (4th Cir. 1977).

Petitioner contends (Pet. 8-10) that between the decision below and this Court's decision in *Costle*, he has been deprived of any opportunity to be heard concerning the environmental consequences of gradually reducing sludge discharges into the ocean and disposing them in landfills. This is not so. Although the 1975 permit did not identify the precise way in which the City would choose to discontinue its sludge discharges, EPA invited public

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[6]In the 1977 Amendments to the Clean Water Act, Congress made a time extension possible under limited circumstances. The 1977 statute added Section 301(i), 91 Stat. 1584-1586, 33 U.S.C. (Supp. II) 1311(i), which allows an extension of the deadline if construction of a project was impossible by July 1, 1977, or if federal funds were not available for a timely construction. The 1977 Amendments also added a new Section 301(h), 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(h). That section allows the Administration to issue an NPDES permit modifying secondary-treatment standards for marine discharges if certain strict conditions are met.

comment in 1975 on its proposal to require the City to adopt some means to phase out sludge discharges. Petitioner did not, however, object at that time.[7]

---

[7]As this Court observed in *Costle* (slip op. 18-19):

> It is undisputed that the most controversial aspects of the Hyperion permit—the compliance schedule for secondary treatment, the "sludge-out" requirement, and the resultant requirement that the city develop an alternative method of sludge disposal—were all included within the 1975 permit. That permit was issued following EPA publication of advance notice of its tentative determination to revise the initial 1974 permit, and a hearing on the proposed revisions. None of the respondents objected to the issuance of the 1975 permit or requested an adjudicatory hearing. We agree with the position advanced by petitioner that respondents may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification that did not even purport to affect those conditions.
>
> The EPA's determination to modify the 1975 permit by extending its expiration date to December 17, 1979, was made following newspaper publication of the proposed action, including notice of an opportunity for submission of comments and hearing requests. Respondent Los Angeles received an individual notice of the EPA's tentative determination to extend the permit, and raised no objection. Respondents PLF and Kilroy, who argue that the EPA was aware of their interest in the Hyperion permit and their opposition to the Interim Sludge Disposal Project, could have received such individual notice if they had asked to be placed on the EPA's mailing list for notices of proposed agency actions within the pertinent geographical area. 40 C.F.R. §125.32(a)(3). They made no such request. Under the circumstances, we think it reasonable that the Regional Administrator decided to extend the expiration date of the permit without another public hearing, on the grounds that the public had not exhibited a significant degree of interest in the action under consideration, and that information pertinent to such a decision would not have been adduced if a hearing had been held. This simply is not a case in which doubt existed concerning the need for a hearing.

2. Subsequent events have all but mooted this case. Under the 1975 time schedule the interim project should have been completed by 1978. Because of the stay of that schedule by the Ninth Circuit in *Costle*, however, the interim project was never built. Furthermore, since the *Costle* decision, the United States and the City of Los Angeles have entered into a settlement of the government's enforcement suit in *United States* v. *Los Angeles*, No. CV 77-3047-HP (C.D. Cal.). Subject to approval by the district court, the government agreed that it will not enforce the sludge-out requirement until July 1, 1985. It is anticipated that this new deadline for enforcement will permit a completely different method for the disposal of the City's sewage (see Br. in Opp. of State of California at 3).[8]

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[8]The consent decree itself (in paragraphs VI, VII, and VIII) evidences the City's abandonment of the interim-sludge project in favor of the Hyperson Energy Recovery System. As PLF and Kilroy stated in their petition for rehearing in *Costle* (at 4), "[t]his project does not involve the trucking and dumping operations to which Kilroy objects."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement.

This action was brought by petitioner John B. Kilroy, Sr., the Pacific Legal Foundation and others in an attempt to preclude enforcement of the conditions of National Pollutant Discharge Elimination System Permit (NPDES Permit) No. CA-0109991 until the preparation of an environmental impact statement (EIS) was complete. The action alleges no improper action by the State of California, and the State of California is a party to this suit only because, pursuant to the California Water Code, sections 13000, *et seq.* (Porter-Cologne Act), it issued Waste Discharge Requirement Order No. 74-329 simultaneously with the Environmental Protection Agency's (EPA) issuance of the NPDES permit. Both the Order and the Permit apply to the same discharges and their issuance represented a cooperative

effort between the state and federal governments to regulate the discharges of waste water to the Pacific Ocean by the City of Los Angeles through its Hyperion Waste Water Treatment Plant. The State of California has a vital interest, therefore, in the outcome of this matter and has consistently supported the position of the United States Government in this case. The brief of the United States is not due in this matter for another twenty days, but the state respondents anticipate being able to support its position again.

The Petition for a Writ of Certiorari Should Be Denied.

No special or important reasons as to why this Honorable Court should grant a writ of certiorari have been presented by the petitioner as required by Rule 19. The order which petitioner asks this Court to review was merely a denial of a request for a preliminary injunction by the District Court. Petitioner has not shown how he would be injured by this denial. The District Court, affirmed by the United States Court of Appeals for the Ninth Circuit, correctly held that the schedule of compliance for an interim sludge disposal system was a condition of the NPDES permit of the City of Los Angeles and therefore was exempt from the EIS requirements of the National Environmental Protection Act (NEPA) pursuant to Title 33, United States Code, section 1371. That section provides that except for permits for new sources (a situation not applicable here) and except for federal financial assistance for the purpose of assisting the construction of publicly owned treatment works, all actions by the Administrator of the EPA pursuant to the Clean Water Act are exempt from the EIS requirements of NEPA. Here, the EPA agreed to prepare an EIS prior to any funding for the interim sludge program but refused to cease requiring that the City of Los Angeles meet the schedule set forth in

the permit during preparation of the EIS. The City had decided how it would meet the permit conditions. This decision was not made by the EPA or the State. Therefore, the only state or federal action involved was the issuance of permit requirements which are clearly exempted from NEPA's EIS mandate.

Again it is noted that this was merely an order refusing to grant a preliminary injunction to stop the EPA from enforcing the compliance schedule for the interim sludge disposal project which is being challenged here. As Petitioner, in footnote 4, page 14 of his Petition for Writ of Certiorari states, the very project which Petitioner is complaining about is not now the preferred system by which the City of Los Angeles intends to meet the permit conditions requiring the cessation of all discharge of sludge to the Pacific Ocean. The interim dewatering and trucking project has never been put into effect. Therefore, there is no trucking taking place pursuant to that project. The interim project is not included in the terms of the negotiated Consent Decree in a related case, *United States v. City of Los Angeles*, No. CV77-3047-HP (C.D.Cal.) (as of this date, the Consent Decree has been signed by all parties and lodged with the District Court but has not yet been entered). The Consent Decree envisions solving the sludge problem by an entirely new project called the Hyperion Energy Recovery System. This system will be a final solution and no interim program is contemplated.

In the future there is, of course, always the remote possibility that the preferred system will not work and another one will become necessary. However, there is absolutely no indication that the City would return to the project here opposed by Petitioner. Any harm to the Petitioner is indeed extremely unlikely.

Conclusion.

Petitioner has presented no valid reason to this Court to justify this Honorable Court's granting of the Petition. Therefore, it is respectfully submitted that this Honorable Court should not review this cause.

Respectfully submitted,

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Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

I

CLEAN WATER ACT § 511(c)(1) DOES NOT PRECLUDE THE ISSUANCE OF AN INJUNCTION IN THIS CASE

This petition was filed because the courts below ruled that Clean Water Act § 511(c)(1), 33 U.S.C. § 1371(c)(1), prohibited the issuance of an injunction which would stop the

implementation of a project being funded by the Environmental Protection Agency (EPA) with Clean Water Act funds required environmental impact statement (EIS) had been prepared. The courts based this ruling on their determination that the particular disputed project (known as the Hyperion Treatment Plant Interim Sludge Disposal Project) was a condition of the National Pollutant Discharge Elimination System (NPDES) permit issued to the City of Los Angeles. The courts reasoned that, as a condition of the permit, the specific alternative disposal project which Kilroy is challenging would fall under the Section 511(c)(1) exemption from the EIS requirement.

The federal respondents have now confessed to this Court that the decisions of the courts below were in error. It is now acknowledged that "the 1975 permit did not identify the precise way in which the City would choose to discontinue its sludge discharges." Brief for the Federal Respondents in Opposition at 7. It is explained that the permit "merely required that some facilities be constructed in accordance with the schedule as a means of prompt compliance with the prescribed schedule."[1] It is clear, therefore, that it is the conditions of the *grant* and not the permit which require the designated trucking and dumping project. However, as explained in the petition for certiorari, both the trial court and the Court of Appeals based their holdings on the contrary assertion by the federal defendants in the trial court that the specific alternative disposal project was a

[1] Clean Water Act § 502(11) and (17), 33 U.S.C. § 1362(11) and (17), define a "schedule of compliance" in a permit as directed toward achievement of effluent limitations or other limitations, prohibitions, or standards on discharges such as the requirement that the sludge discharge be terminated. Such schedules do not mandate specific projects such as the Hyperion Treatment Plant Interim Sludge Disposal Project.

condition of the permit.[2] This admission of error supports the request of petitioner Kilroy that the decision of the United States Court of Appeals for the Ninth Circuit should be summarily reversed and remanded for reconsideration of the application of Clean Water Act § 511(c)(1) in light of this admission by the federal respondents and the decision of this Court in *Costle* v. *Pacific Legal Foundation.* 48 U.S.L.W. 4243 (1980).

II

THIS CASE IS NOT MOOT

In spite of the admitted error, it is suggested that the petition should be denied because an injunction[3] against the Hyperion Treatment Plant Interim Sludge Disposal Project would interfere with permit requirements setting a compliance schedule for the termination of the ocean discharge of sludge or because "[s]ubsequent events have all but mooted this case."

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[2] After admitting the error, respondents defend the result of the decisions by claiming that "plaintiffs had also sought a preliminary injunction against EPA's policy to eliminate the disposal of sludge in the ocean." Brief for the Federal Respondents in Opposition at 4 n.3. This claim is inaccurate. The request for injunction is accurately quoted by the federal respondents in the text on page 4 of their brief. It was directed solely to the implementation of the disputed interim sludge project, including trucking and dumping; it did *not* request that the schedule for termination of the sludge discharge be enjoined. Therefore, the substantial portion of respondents' opposition which attempts to support the refusal to enjoin the schedule for the termination of the sludge discharge is irrelevant.

[3] Petitioners submit that the injunction at issue in this case is not in the nature of a "preliminary" injunction as indicated in respondents' opposition. Although the motion as filed requested a preliminary injunction, the case on the merits was conceded by the federal defendants in the trial court before the motion was heard. *See* Appendix C to Petition for Certiorari. Therefore, the trial court's ruling was directed to whether an order in the nature of a permanent injunction should issue pending completion of the EIS.

Brief for the Federal Respondents in Opposition at 9. In fact, only issues relating to the old compliance schedule for terminating the discharge are moot. The dispute over the alternative sludge disposal method is very much alive and EPA has not completed an EIS for this project. The compliance schedule in the 1975 permit is meaningless—its effective dates having long since past. A new compliance schedule has been established in a consent decree[4] which sets July 1, 1985, for full implementation of the termination of the sludge discharge. There is ample time to prepare an EIS for alternative sludge disposal projects within the time frame established by the consent decree.[5] Moreover, respondents' statement that the consent decree "evidences the City's abandonment of the interim sludge project" (Brief for the Federal Respondents in Opposition at 9 n.8) is less than accurate. The City has never favored EPA's preferred trucking and dumping project. The City itself was concerned with the negative environmental consequences of such an ill-conceived project and requested EPA to prepare an EIS prior to requiring the implementation. The consent decree requires the termination of the sludge discharge and indicates that the City will *attempt* to achieve that requirement with the Hyperion energy recovery system. The consent decree does *not* state that trucking and dumping will not occur and attorneys for EPA refused a request by attorneys for Kilroy that a provision be included in the consent decree which would preclude the use of trucking and dumping. It must be emphasized that EPA makes reference only to what it claims are the City's intentions. It has made no statements concerning the status of its own decision on the trucking and dumping alternative.

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[4] *See* Brief for the Federal Respondents in Opposition at 9.

[5] Work began over three years ago on an EIS which "will include a detailed analysis of the potential environmental impact of the Interim Sludge Disposal Project. This analysis will include a discussion of alternatives to the Interim Sludge Disposal Project." Appendix C to Petition for Certiorari at C-4.

The decisions below hold that the trial court is precluded by law from issuing an injunction if EPA is funding a project for the purpose of contributing towards the achievement of an NPDES permit condition. The effect of this holding is devastating on those such as Kilroy who desire to exercise the right created by Congress for interested persons to participate effectively in EPA's decisions relating to the environmental consequences of the construction of wastewater treatment facilities. Under EPA's grant regulations, project funding is to be directed to "enforceable requirements of the Act." *See, e.g.,* 40 C.F.R. § 39.915(a) and (g) (Sept. 27, 1978). This phrase is defined to mean conditions or limitations set forth in an NPDES permit. 40 C.F.R. § 35.905 (Sept. 27, 1978). Therefore, most if not all major construction activities financed by EPA under the Clean Water Act are for the purpose of complying with discharge conditions or limitations in a permit. The facts of this case make it abundantly clear that EPA will take advantage of this major precedent to shield these projects from the public scrutiny and critical review which Congress intended should occur through the EIS process. Only action by this Court can reverse this clearly erroneous interpretation of Clean Water Act § 511(c)(1).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit summarily reversed and remanded for reconsideration in light of the admissions by federal respondents and the decision of this Court in *Costle* v. *Pacific Legal Foundation.*

Respectfully submitted,

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In the Supreme Court

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United States

OCTOBER TERM, 1979

JOHN B. KILROY, SR.,
Petitioner,

v.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; PAUL DEFALCO, JR., in his official capacity as Regional Administrator, Region IX, United States Environmental Protection Agency; THE STATE WATER RESOURCES CONTROL BOARD; JOHN E. BRYSON, in his official capacity as Chairman of the State Water Resources Control Board; REGION IV OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD; and RAYMOND M. HERTEL, in his official capacity as Executive Officer of Region IV of the California Regional Water Quality Control Board,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

In a prior decision directly related to this matter, *Costle v. Pacific Legal Foundation*, 48 U.S.L.W. 4243 (1980), this Court indicated that petitioner Kilroy was not being disadvantaged by the refusal of the Environmental Protection Agency (EPA) to provide him with an opportunity to be heard because August, 1980, was the "outside date" by

which new permit proceedings involving the public, including Kilroy, would have to occur. The Court, therefore, concluded that any potential for EPA to "evade further public scrutiny" "was a limited one" and "any additional extension for purposes of avoiding further hearings on the permit's compliance schedule would have little practical impact." 48 U.S.L.W. at 4249 n.14.

The Court's attention is respectfully directed to the fact that the August, 1980, "outside date for extensions of the 1975 permit" has arrived. EPA has conducted no public hearings on the permit. EPA has not scheduled any public hearings or other form of public participation on the permit requirements. Instead, EPA continues to ignore the statutory requirements and to "evade further public scrutiny" while pressuring the City of Los Angeles to accede to EPA's demands for its sludge project. Despite the passage of the date recognized by this Court as the "outside date" to allow Kilroy to participate on the permit requirements, EPA continues to frustrate all public participation and to evade the public scrutiny requirements of both the Federal Water Pollution Control Act and the National Environmental Policy Act. In the meantime, EPA is imposing on the citizens of Los Angeles project requirements which will cause significant adverse effects on the Los Angeles environment. Petitioner Kilroy respectfully urges the Court that, in light of the clear intent now demonstrated by EPA to continue indefinitely to "extend" an expired permit in order to avoid public disclosure of the adverse consequences of its project, the decision by the Court of Appeal must be reversed with instructions that an injunction

be entered prohibiting EPA from requiring the implementation of its sludge disposal project until an adequate environmental impact statement has been prepared.

Respectfully submitted,

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